Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-4 OF 2008(W)
ALAUDDIN PCA, MOHD GHAZALI AND ABDULL HAMID EMBONG FCJJ
8 MARCH 2010

Constitutional Law — Executive — Dismissal of Minister — Revocation of appellant's appointment as Deputy Prime Minister and Minister of Finance by Prime Minister — Whether prior approval of Yang di-Pertuan Agong required — Whether dismissal valid — Federal Constitution art 43(5)

Constitutional Law — Executive — Dismissal of Minister — Revocation of appellant's appointment as Deputy Prime Minister and Minister of Finance by Prime Minister — Whether there was any legal provision as to how to effect revocation of ministerial appointment — Whether revocation of appellant's appointment to be conveyed to appellant personally by Yang di-Pertuan Agong — Whether sufficient for Yang di-Pertuan Agong to gazette an order under s 2 of the Ministerial Functions Act 1969 — Ministerial Functions Act 1969 s 2

Constitutional Law — Yang di-Pertuan Agong — Roles and functions of — Yang di-Pertuan Agong's role in appointment and revocation of ministerial office, whether limited — Whether power to appoint and revoke ministerial appointments at Prime Minister's discretion — Whether reference to Yang di-Pertuan Agong in art 43(5) of the Federal Constitution a mere formality — Federal Constitution art 43(5)

The appellant had his appointments as Deputy Prime Minister and Minister of Finance revoked with immediate effect by the first respondent through a letter dated 2 September 1998. The appellant contended that the first respondent had unlawfully revoked his appointment as a Cabinet Minister. It was the appellant's contention, inter alia, that the first respondent had effected the revocation without having the prior assent of the Yang di-Pertuan Agong. The appellant sought various declarations and relief in the High Court but his action was struck out on the respondents' application under O 18 r 19(1) of the Rules of the High Court 1980. The appellant's subsequent appeal to the Court of Appeal was dismissed and he thus appealed to the Federal Court. In the Federal Court, the appellant's appeal was pursued on the basis that: (i) pursuant to art 43(5) of the Federal Constitution

('Constitution'), it was only the Yang di-Pertuan Agong who could revoke the appellant's appointments as Deputy Prime Minister and Minister of Finance; and (ii) an order to delete the name of the appellant from the post of Deputy Prime Minister and its substitution thereof with the name of the first respondent as the Minister of Finance under the Ministers of the Federal Government (Amendment) Order 1998 ('the Order') could not cure the first respondent's non-compliance with the art 43(5) of the Constitution.

Held, dismissing the appeal with costs:

(1) Article 40(2) of the Constitution divides the functions of the di-Pertuan Agong into two distinct categories; ie those functions that His Majesty may exercise in His Majesty's discretion and those that His Majesty must exercise in accordance with ministerial advice. The Yang di-Pertuan Agong as a constitutional monarch has a very limited role concerning the appointment of Cabinet Ministers. In actual fact, the power to choose and appoint Ministers resides with the Prime Minister. His Majesty does not have any discretion to reject or question the discretion of the Prime Minister. Revocation of ministerial appointment equally lies with the Prime Minister, having regard to the principle that it is only the authority that appoints which has the right to revoke the appointment. Reference to the Yang di-Pertuan Agong in art 43(5) of the Constitution is only a formality by virtue of His Majesty being the constitutional monarch. Such a clear demarcation of power and roles between the Prime Minister and the Yang di-Pertuan Agong in matters of appointment and revocation of ministerial posts is imperative in order to realise the role of collective responsibility of the Cabinet Ministers (see paras 32 & 43); *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 (HC); [1982] 2 MLJ 243 (FC) followed.

(2) In the instant appeal, the Federal Court would agree with the High Court and Court of Appeal that the requirements under art 43(5) of the Constitution had been met. On the facts, the revocation of the appellant's appointment was made in accordance with art 43(5) of the Constitution and was therefore valid in law. The appellant's contention that it was the first respondent who had effected the revocation and not the Yang di-Pertuan Agong was fallacious and untenable (see paras 44 & 52).

(3) The format and manner on how a revocation is to be effected is not provided in the law. Neither is there any legal provision which provides for the revocation to be gazetted. There is also no legal provision which requires the revocation of the appointment of the appellant to be conveyed to the appellant personally by the Yang di-Pertuan Agong (see para 56).

(4) The Order as a *Gazette* was a form of subsidiary legislation and deemed to be validly made under the enabling powers thereto. A *Gazette* constituted prima facie evidence of the terms of written law, appointment or other matters stated therein. In the instant case, the Order was made by the Yang di-Pertuan Agong by virtue of s 2 of the Ministerial Functions Act 1969. Therein, His Majesty had notified the revocation of the appellant's appointment and that the Order was made under His Majesty's command. Such a command from His Majesty, in the absence of any contrary evidence, implied that it was made with explicit assent. Once the assent was given, it showed that His Majesty had accepted the advice of the Prime Minister and had acted on such advice (see paras 57–58, 60–61).

(5) The *Gazette* was sufficient evidence to show that the requirements of art 43(5) of the FC had been met. The appointment of the appellant as the Deputy Prime Minister and the Minister of Finance had therefore been validly revoked by the said Order. Thus the omission of the first respondent, if any, to follow the requirements under art 43(5) was curable by the said Order (see paras 62–63).

[Bahasa Malaysia summary

Perlantikan perayu sebagai Timbalan Perdana Menteri dan Menteri Kewangan ditamatkan berkuat kuasa serta merta oleh responden pertama menerusi sepucuk surat bertarikh 2 September 1998. Perayu berhujah bahawa responden pertama telah secara salah menamatkan perlantikannya sebagai Menteri Kabinet. Menjadi hujahan perayu, antara lain, bahawa responden pertama telah menguatkuasakan penamatan tersebut tanpa mendapat perkenan Yang di-Pertuan Agong. Perayu memohon beberapa perisytiharan dan relief di Mahkamah Tinggi tetapi tindakannya dibatalkan atas permohonan responden-responden di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Rayuan perayu ke Mahkamah Tinggi ditolak dan oleh itu, dia merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, rayuan perayu adalah berdasarkan: (i) berikutan perkara 43(5) Perlembagaan Persekutuan ('Perlembagaan'), hanya Yang di-Pertuan Agong boleh menamatkan perlantikan perayu sebagai Timbalan Perdana Menteri dan Menteri Kewangan; dan (ii) suatu perintah untuk memadam nama perayu daripada jawatan Timbalan Perdana Menteri dan menggantikannya kepada nama responden pertama sebagai Menteri Kewangan di bawah Perintah Menteri-Menteri Kerajaan Persekutuan (Pindaan) 1998 ('Perintah tersebut') tidak boleh memperbetulkan ketidakpatuhan responden pertama terhadap perkara 43(5) Perlembagaan.

Diputuskan, menolak rayuan dengan kos:

(1) Perkara 40(2) Perlembagaan membahagikan fungsi-fungsi Yang di-Pertuan Agong kepada dua kategori; iaitu fungsi-fungsi Duli Yang

Maha Mulia boleh laksanakan mengikut budi bicara baginda dan fungsi-fungsi yang harus dilaksanakan menurut nasihat menteri. Yang di-Pertuan Agong, sebagai lambang Perlembagaan mempunyai fungsi yang terhad berkaitan perlantikan Menteri-Menteri Kabinet. Sebenarnya, kuasa untuk memilih dan melantik Menteri-Menteri terletak pada Perdana Menteri. Duli Yang Maha Mulia tidak mempunyai sebarang budi bicara untuk menolak atau mempersoal budi bicara Perdana Menteri. Penamatan perlantikan menteri juga terletak pada Perdana Menteri, menurut prinsip bahawa hanya kuasa yang boleh melantik, berhak menamatkan perlantikan tersebut. Rujukan kepada Yang di-Pertuan Agong dalam perkara 43(5) Perlembagaan hanyalah keformalan kerana Duli Yang Maha Mulia merupakan lambang Perlembagaan. Pembatasan kuasa dan fungsi yang jelas antara Perdana Menteri dan Yang di-Pertuan Agong dalam hal-hal perlantikan dan penamatan jawatan menteri adalah sangat penting bagi menzahirkan fungsi tanggungjawab kolektif Menteri-Menteri Kabinet (lihat perenggan 32 & 43); *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 (MT), [1982] 2 MLJ 243 (MP) diikut.

(2) Dalam rayuan ini, Mahkamah Persekutuan tentu bersetuju dengan Mahkamah Tinggi dan juga Mahkamah Rayuan bahawa keperluan-keperluan di bawah perkara 43(5) Perlembagaan telah dipenuhi. Di atas fakta-fakta, penamatan perlantikan perayu dilaksanakan menurut perkara 43(5) Perlembagaan dan oleh itu sah di sisi undang-undang. Hujahan perayu bahawa responden pertama yang melaksanakan penamatan tersebut dan bukannya Yang di-Pertuan Agong adalah salah dan tidak dapat dipertahankan (lihat perenggan 44 & 52).

(3) Format dan cara bagaimana melaksanakan suatu penamatan tidak diperuntukkan dalam undang-undang. Juga tiada peruntukan perundangan yang mengkehendaki penamatan perlantikan perayu harus disampaikan sendiri oleh Yang di-Pertuan Agong (lihat perenggan 56).

(4) Perintah tersebut sebagai suatu Warta merupakan undang-undang subsidiari dan dianggap sebagai telah dibuat dengan sah di bawah kuasa-kuasa yang sepatutnya. Suatu Warta merupakan keterangan prima facie bagi terma-terma undang-undang bertulis, perlantikan atau hal-hal lain yang dinyatakan. Dalam kes ini, Perintah tersebut dibuat oleh Yang di-Pertuan Agong berikutan s 2 Akta Fungsi-Fungsi Menteri 1969. Oleh itu, Duli Yang Maha Mulia telah memaklumkan penamatan perlantikan perayu dan bahawa Perintah tersebut dibuat di bawah titah perintah Duli Yang Maha Mulia. Titah Perintah tersebut, tanpa ada keterangan yang berlawanan, menunjukkan bahawa Perintah itu dibuat dengan perkenan yang jelas. Setelah perkenan diberikan,

menunjukkan bahawa Duli Yang Maha Mulia telah menerima nasihat Perdana Menteri dan telah bertindak berdasarkan nasihat tersebut (lihat perenggan 57–58, 60–61).

(5) Warta tersebut merupakan keterangan yang mencukupi bagi menunjukkan keperluan-keperluan perkara 43(5) Perlembagaan telah dipenuhi. Perlantikan perayu sebagai Timbalan Perdana Menteri dan Menteri Kewangan telah ditamatkan secara sah oleh Perintah tersebut. Oleh itu, peninggalan oleh responden pertama, jika ada, untuk mematuhi keperluan-keperluan di bawah perkara 43(5) boleh diperbetulkan dengan Perintah tersebut (lihat perenggan 62–63).]

Notes

For a case on dismissal of Minister, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2029.

For cases on Yang di-Pertuan Agong generally, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2418–2421.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2000] 2 MLJ 486, CA (folld)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (not folld)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356, HC (folld)

Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (folld)

Shamim Reza bin Abdul Samad v PP [2009] 2 MLJ 506; [2009] 6 CLJ 93, CA (not folld)

Sim Kie Chon v Superintendant of Pudu Prison & Ors [1985] 2 MLJ 385, SC (refd)

Tan Boon Liat @ Allen & Anor et al, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108, FC (not folld)

Legislation referred to

Constitution of India arts 74, 75(2)

Federal Constitution arts 39, 40, 40(1), (1A), (2), 43(1)(b), (5)

Interpretation Acts 1948 and 1967 ss 18(1)(b), 25, 61

Ministerial Functions Act 1969 s 2, 2(1), (2)

Rules of the High Court 1980 O 18 r 19, 19(1)(a), (b), (d)

Appeal from: Civil Appeal No W-01–164 of 1998 (Court of Appeal, Putrajaya)

Karpal Singh (SN Nair, Ramkarpal Singh and Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.

Kamaludin bin Md Said (Azizan Md Arshad with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Alauddin PCA:

INTRODUCTION

[1] This is an appeal against the judgment of the Court of Appeal which confirmed the decision of the High Court given on 23 December 1998.

[2] On 16 June 2008, the Federal Court granted leave to the appellant for the determination of the following questions:

(a) Whether the provision of art 43(5) ('the said article') of the Federal Constitution ('FC') specifically require the DYMM Yang Di-Pertuan Agong to be the authority which revokes the appointment of the Deputy Prime Minister and Minister of Finance in the Malaysian Cabinet, having regard to the principle that it is only the authority which appoints has the right to revoke any appointment made by it;

(b) Whether the deletion of the name of the appellant from the post of Deputy Prime Minister and its substitution thereof with the name of the first respondent as the Minister of Finance by virtue of the Ministers of the Federal Government (Amendment) Order 1998 'the said Order' could in any way cure the complete absence of the first respondent complying with the explicit provision of the said article?

BACKGROUND FACTS

[3] The appellant was appointed as the Deputy Prime Minister and also the Minister of Finance after the general election in 1995. On 2 September 1998, the appellant was served with a letter ('letter of revocation') from the first respondent stating that his appointment as the Deputy Prime Minister and Minister of Finance was revoked with immediate effect.

[4] The letter of revocation reads as follows:

Yang Berhormat Dato' Seri Anwar bin Ibrahim

Yang Berhormat Dato',

Dengan dukacitanya saya terpaksa melucutkan jawatan-jawatan Timbalan Perdana Menteri dan Menteri Kewangan daripada Dato' Seri serta lain-lain jawatan dalam Kerajaan yang dipegang oleh Dato' Seri sebagai Timbalan Perdana Menteri dan Menteri Kewangan.

Perlucutan ini berkuatkuasa dari hari ini, 2 September 1998 mulai jam 5.30 petang.

Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong.

Salam hormat.

t.t

Dr. Mahathir bin Mohamad

2 September 1998.

[5] Premised on the letter of revocation, the appellant contended that the first respondent had unlawfully revoked his appointment as a Cabinet Minister. According to the appellant the revocation of his appointment was in contravention of the said article. The reason is, the wordings of the letter of revocation that 'Perlucutan ini telah *dimaklumkan* kepada Seri Paduka Baginda Yang di-Pertuan Agong' runs in the face of the clear wordings of the said article which provides that the appointment of any Minister shall be revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister. In other words the contention of the appellant is that the revocation must be effected by the Yang di-Pertuan Agong acting on the advice of the first respondent. It cannot be effected by the first respondent without having the prior assent of the Yang di-Pertuan Agong.

[6] Aggrieved with the above decision the appellant filed an originating summons ('OS') at the High Court Kuala Lumpur (see pp 20–25 of the AR) seeking the following relief:

(a) a declaration that the first respondent had acted in contravention of the provisions of the said article when purporting to dismiss the appellant from the Malaysian Cabinet;

(b) a declaration that the appellant's dismissal as a Minister in the Malaysian Cabinet by the first respondent from 5.30pm on 2 September 1998 is null and void, inconsequential and of no effect;

(c) a declaration that the appellant is still a Minister in the Malaysian Cabinet; and

(d) costs and other relief deemed fit and proper.

A [7] After having entered appearance, the respondents then filed an application pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC') to strike out the appellant's OS and affidavit in support on the grounds that the pleadings disclose no reasonable cause of action and that they are scandalous, frivolous, vexatious and an abuse of the process of
B court.

[8] The respondents' application was premised on the following grounds:

(a) the Yang di-Pertuan Agong had given His Majesty's assent to the
C appellant's dismissal;

(b) the Yang di-Pertuan Agong had made the said Order, to delete the name of the appellant from the post of Deputy Prime Minister and had substituted in that column with the name of the first respondent for the post of the Finance Minister; and

D

(c) this is a clear and obvious case for the court to strike out the appellant's OS and the affidavit in support.

[9] The learned judge agreed with the respondents and dismissed the
E appellant's OS. The learned judge was satisfied that the letter of revocation had satisfied the requirement of the said article.

[10] The appellant's appeal to the Court of Appeal was dismissed. Hence the present appeal.

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FINDINGS OF THE HIGH COURT

[11] In essence the High Court held that as the Yang di-Pertuan Agong was informed of the decision of the first respondent to dismiss the appellant from
G his posts, the omission to state the same in the revocation letter dated 2 September 1998 was inconsequential. The requirement under the said article of the FC had been satisfied thus the revocation of the appointment of the appellant was validly made.

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[12] As there was no dispute to the facts of the case and the court had made its finding on the legal effect of the said article, the action discloses no reasonable cause of action and was obviously unsustainable.

I **[13]** This is what the learned judge said in his judgment:

> It is true that there is nothing in PM's letter to show that the letter was written at the behest of the King. Nevertheless as the King was advised and informed about the decision (keputusan) as evidenced by paras 4 and 5 of the affidavit (encl 10) of the private secretary, such omission, in my view, is of no consequence. A fortiori,

the aforesaid affidavit evidences lend support to the averment in PM's letter in that he (PM) had informed the King about the revocation. Looking at undisputed facts objectively, in substance although not in form, in my judgment, the letter of revocation, has satisfied the requirement of art 43(5).

FINDINGS OF THE COURT OF APPEAL

[14] The Court of Appeal in its judgment agreed with the interpretation of the said article as expressed by His Lordship Justice Lamin PCA (as he then was) in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486. There the learned judge was of the view that a Minister holds office at the pleasure of the Prime Minister. It is the Prime Minister who decides on the revocation of his appointment. Reference to the Yang di-Pertuan Agong in the article is only a matter of formality for the Yang di-Pertuan Agong had no say in such a matter but to act on it.

[15] Speaking through Raus Sharif JCA (as he then was) the Court of Appeal had this to say in its judgment (see p 118 of the AR):

> Under the scheme of our Federal Constitution, the Yang di-Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di-Pertuan Agong to dismiss any Minister and His Majesty is bound to act on the advice of the Prime Minister. In short, no Minister can remain as a member of the cabinet if the Prime Minister decided that he should be dismissed.

[16] The same view was expressed by Zulkefli Ahmad Makinudin JCA (as he then was) in his judgment (at pp 125–126 of the AR). His Lordship opined:

> As rightly stated by my learned brother Raus Sharif JCA in his judgment that under the scheme of our Federal Constitution the power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di-Pertuan Agong to dismiss any Minister and the Yang di-Pertuan Agong as a constitutional monarch is bound to act on the advice of the Prime Minister.

[17] The Court of Appeal further held that based on the uncontroverted evidence before the Court, the Yang di-Pertuan Agong had been informed and advised on the revocation of the appellant's appointment and that the Yang di-Pertuan Agong had accepted the said advice. The revocation of the appellant's appointment was held to be rightly made.

THE APPEAL

[18] Before us, Encik Karpal Singh, learned counsel for the appellant

submitted that the learned judges of the Court of Appeal were wrong in not holding that the requirement of the said article of the FC in relation to the dismissal of the appellant as the Deputy Prime Minister and Minister of Finance had been contravened by the first respondent.

[19] Learned counsel further submitted that the learned judges of the Court of Appeal were wrong in not holding that the first respondent had clearly abused his power by revoking the appellant's appointment as the Deputy Prime Minister and Minister of Finance and then informing the Yang di-Pertuan Agong when it was the Yang di-Pertuan Agong alone who had the prerogative to revoke the appellant's appointment pursuant to the said article.

[20] Since it was the Yang di-Pertuan Agong who in the first place appointed the appellant to the said positions pursuant to art 43(1)(b) of the FC on the advice of the first respondent it must follow that only the Yang di-Pertuan Agong, being the appointing authority, could revoke that appointment. Section 29 of the Interpretation and General Clauses Ordinance 1948 was quoted in support of this submission.

[21] It was also submitted by Encik Karpal that the learned judges of the Court of Appeal were wrong in not holding that the deletion of the name of the appellant from the post of Deputy Prime Minister and Minister of Finance and substitution thereof with the name of the first respondent as the Minister of Finance by virtue of the said Order, could not in any way cure the complete absence of the first respondent complying with the explicit provisions of the said article.

[22] It was further submitted that it is a prerequisite that compliance with the provisions of the said article is met before deletion and substitution can be effected by virtue of the said Order. According to Encik Karpal, the appellant's case was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out. He submitted that the letter of revocation by itself had raised a serious question to be tried ie whether prior assent of the Yang di-Pertuan Agong had been obtained when the letter of revocation was sent to the appellant.

[23] At the close of his submission Encik Karpal quoted the cases of *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108; *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Shamim Reza bin Abdul Samad v Public Prosecutor* [2009] 2 MLJ 506; [2009] 6 CLJ 93 in support. However we found the above cases to be irrelevant to the issue raised before us.

[24] Learned senior federal counsel in the person of Dato' Kamaludin bin Md Said submitted otherwise. For the reasons he had advanced he submitted that the High Court and the Court of Appeal were right in their decisions that the appellant's case was obviously unsustainable.

[25] The principle governing O 18 r 19 of the RHC is well settled. The Federal Court in *Sim Kie Chon v Superintendant of Pudu Prison & Ors* [1985] 2 MLJ 385 at p 386 held:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19 of the Rules of the High Court 1980: 'the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[26] Again, the Federal Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43, echoed the same sentiment in the following words:

> The principles upon which the courts act in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

[27] The Federal Court further stated:

> The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[28] Thus the main issue for consideration before us is whether the appellant's claim is obviously unsustainable.

[29] In order to do so, it is necessary that we examine the questions posed and the relevant provisions in the FC in relation to the appointment and revocation of Cabinet Ministers.

OUR FINDINGS

[30] To reiterate, question 1 reads as follows:

> Whether the provision of the said article of the FC specifically require the DYMM Yang di-Pertuan Agong, to be the authority which revokes the appointment of Deputy Prime Minister and Minister of Finance in the Malaysian Cabinet, having regard to the principle that it is only the authority which appoints has the right to revoke any appointment made by it.

[31] We shall start by saying that under the FC the Yang di-Pertuan Agong is a constitutional monarch. His functions and powers are as entrenched in the following articles:

> Article 39 Executive Authority of the Federation
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> The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive function on other persons.
>
> Article 40 Yang di-Pertuan Agong to act on advice
>
> (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
>
> (1A)In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.
>
> (2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
>
> (a) the appointment of a Prime Minister;
>
> (b) ...;
>
> (c) ...;
>
> and in any other case mentioned in this Constitution.
>
> Article 43(5) (the said article)
>
> Subject to Clause (4), Ministers other than the Prime Minister shall hold office during the pleasure of the Yang di-Pertuan Agong, unless the appointment of any Minister shall have been revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.

[32] It must be properly observed that art 40 divides the functions of the Yang di-Pertuan Agong into two distinct categories ie those functions that he may exercise in his discretion and those that he must exercise or act in accordance with ministerial advice.

[33] Except for his function under art 40(2) which provides that the Yang di-Pertuan Agong may act in his discretion, the other functions to be

exercised by him under the Constitution or federal law shall be exercised in accordance with the advice of the Cabinet or Minister acting under the general authority of the Cabinet.

[34] In *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 (at p 358) Abdoolcader J (as he then was) had this to say:

> It would perhaps be appropriate to clarify two matters at this exordial stage. First, the Yang di-Pertuan Agong is a constitutional monarch and is required under art 40(1) of the Federal Constitution in the exercise of his function (except on certain matters that do not concern these proceedings) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia* [1981] 2 MLJ 259).

[35] The same case went on appeal to the Federal Court *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243. At p 246, speaking through Suffian LP (as he then was) the Federal Court said:

> Though the plaintiff's application was rejected by His Majesty, in fact the decision was that of the government, because His Majesty is a constitutional monarch and in this regard he was required by art 40(1) of the Constitution to:
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> > act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet ... (see also *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486).

[36] On the same issue learned scholars and authors on constitutional law share the same view. Professor MP Jain in his book *Administrative Law of Malaysia & Singapore* (3rd Ed) at p 561 said:

> In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia*,[103] the Federal Court ruled that the Yang di-Pertuan Agong in exercising power to make a detention order under s 8(1) of the Internal Security Act 1960, would act on the advice of the Cabinet and not on his own personal satisfaction.[104] As the Privy Council emphasised,[105] the functions of the Yang di-Pertuan Agong are those of a constitutional monarch and except on certain matters he does not exercise any of his functions under the Constitution on his own initiative.

[37] On the appointment of members of the Cabinet Henry E Groves in his book *The Constitution of Malaysia, 1964* observed:

A The Prime Minister selects all members of the Cabinet from among the members of either House of Parliament. Their appointment is effected by the Yang di-Pertuan Agong acting without discretion on the advice of the Prime Minister.

B **[38]** In order to understand the issue in its proper perspective we feel it is appropriate that we refer to the provisions of the Constitution of some other jurisdictions.

C **[39]** In particular we would like to refer to art 74 of the Indian Constitution which is in pari materia with art 40(1) of our Constitution. It reads:

Council of Ministers to aid and advise President

D [(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:]

E **[40]** Article 75(2) of the Indian Constitution is in pari materia with our art 43(5) (the said article). *VN Shukla's Constitution of India* (7th Ed, India) at p 247 commented that:

F Clause 2 lays down that the Ministers hold office during the pleasure of the President. The fact that each member holds office at the pleasure of the President indicates that his office is at all times at the Prime Minister's disposal, for in these matters the President, like the King in England, acts on the advice of the Prime Minister. Moreover for the effective realization of the rule of collective responsibility of the Council of Ministers, it is necessary that no person should be nominated to the Cabinet except on advice of the Prime Minister. Secondly, no person should be retained, as a member of the Cabinet if the Prime Minister says that he should be dismissed.

G **[41]** Referring to the UK position, O Hood Phillips in his book *Constitutional and Administrative Law* (5th Ed, 1973) at p 86 remarked as follows:

H The Queen is bound to exercise her legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister. She has the right to be kept informed and to express her views on the questions at issue, but not to override ministerial advice.

I **[42]** Further at p 273, the writer opined:

It should be borne in mind that the Prime Minister may always advise the Sovereign to dismiss a Minister — all ministerial posts are regarded as being at his disposal.

[43] In view of the foregoing provisions it is our judgment that the Yang di-Pertuan Agong as a constitutional monarch has a very limited role concerning the appointment of Cabinet Ministers. In actual fact the power to choose and appoint Ministers resides with the Prime Minister. The Prime Minister is responsible in choosing his Cabinet members. The Yang di-Pertuan Agong upon being advised by the Prime Minister on the choice of his candidates must act on such advice. His Majesty does not have any discretion to reject or question the discretion of the Prime Minister. Revocation of the appointment equally lies with the Prime Minister having regard to the principle that it is only the authority which appoints has the right to revoke the appointment. If the Prime Minister has decided that a particular Minister should cease from holding the office of a Minister then the Yang di-Pertuan Agong would not be able to say otherwise. Reference to the Yang di-Pertuan Agong in the said article of the FC is only a formality by virtue of His Majesty being the constitutional monarch. Such a clear demarcation of power and roles between the Prime Minister and the Yang di-Pertuan Agong in matters of appointment and revocation of ministerial posts is imperative in order to realise the role of collective responsibility of the Cabinet Ministers.

[44] Reflecting on the undisputed facts in the appeal before us we agree with the learned High Court judge and the judges of the Court of Appeal that the requirement under the said article of the FC had been met.

[45] We have no doubt that the first respondent here had conveyed his decision to revoke the appointment of the appellant as the Deputy Prime Minister and the Minister of Finance to the Yang di-Pertuan Agong and His Majesty had no objection (please refer to the *Hansard* dated 23 October 1998 at pp 85–88 of the AR).

[46] Following that the Yang di-Pertuan Agong had accepted the decision and advice of the first respondent regarding the revocation of the appellant's appointment (please refer to paras 4 and 5 of Haji Ja'apar's affidavit at p 71 of the AR).

[47] In his affidavit affirmed on 13 November 98 (see pp 58–61 of the AR) at para 5 the appellant also deposed that the revocation of his appointment had been communicated to the Yang di-Pertuan Agong (see also exhs DSA-1 and DSA-2 at pp 80–82 of the AR).

[48] In assessing these facts the Court of Appeal (speaking through Raus JCA (as he then was) held as follows (see p 120 of the AR):

A My respectful view is that the revocation letter by itself to a certain extent had created an impression that the formality of advising the Yang di-Pertuan Agong was not done by the first respondent. However looking at the affidavits filed in support of the respondents' application, there is more than sufficient evidence to show that the formality was done. We have the affidavit evidence of Hj Ja'apar who had B affirmed that the Yang di-Pertuan Agong had accepted the decision and the advice of the first respondent pertaining to the revocation of the appellant The appellant did not contradict the said evidence. It is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated C as an admission by him of the fact so asserted (see *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29; *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

D **[49]** Speaking for the Court of Appeal, Zulkefli Ahmad Makinudin JCA (as he then was) had this to say in respect of the revocation letter:

It has also to be stated here that the format and the manner on how a revocation of the appointment of a Cabinet Minister is to be effected is not provided in the E law. There is also no provision in the law that the revocation of the appointment of the appellant as a Cabinet Minister shall be communicated to the appellant personally by the Yang di-Pertuan Agong. The letter for the revocation of the appointment of the appellant which was handed to the appellant stated that the Yang di-Pertuan Agong had been informed. It is my view by this statement from F the first respondent it would be a fair inference to make a finding that in fact on or before 2 September 1998 the decision and the advice of the first respondent had already been conveyed to the Yang di-Pertuan Agong and that the Yang di-Pertuan Agong had accepted the said decision and advice. The case for the respondents is further fortified by the affidavit evidence of Hj Ja'apar bin Wahab who was the Confidential Secretary to the Yang di-Pertuan Agong, affirming that the Yang G di-Pertuan Agong had informed him of the decision and the advice of the first respondent to revoke the appellant's appointment as a Minister and His Majesty had duly accepted the said decision and advice of the first respondent.

H **[50]** With respect, we agree fully with the findings of the Court of Appeal as mentioned above.

[51] We also agree, based on facts that the revocation of the appellant's appointment was made in accordance with the said article of the FC and I therefore valid in law.

[52] We find that the appellant's contention that it was the first respondent who had effected the revocation and not the Yang di-Pertuan Agong is fallacious and untenable.

[53] Premised on the above, we must with utmost respect to the appellant say that the only answer that we can give to the first question is in the negative.

[54] We shall now consider question 2 which reads:

> Whether the deletion of the name of the applicant from the post of Deputy Prime Minister and its substitution thereof with the name of the first respondent as the Minister of Finance by virtue of the said Order could in any way cure the complete absence of the first respondent complying with the explicit provision of the said article?

[55] Obviously the second question is predicated upon a positive answer to question 1. The factual matrix to this question can be gleaned from the affidavits deposed by Hj Ja'apar (pp 70–73 of the AR) and Tan Sri Halim Ali (pp 66–69 of the AR). The said Order was sent to the Yang di-Pertuan Agong and His Majesty gave assent to it. The said Order was duly gazetted as PU (A) 332 (see exh AHA-1 at pp 90–93 of the AR). In the said Order the name of the appellant was deleted from the columns of 'Persons' in the Prime Minister's Department and the post of the Minister of Finance was substituted with the name of the first respondent.

[56] As we have stated earlier, the format and manner on how a revocation is to be effected is not provided in the law. Neither is there any provision in the law which provides for the revocation to be gazetted. There is also no provision in the law which requires the revocation of the appointment of the appellant to be conveyed to the appellant personally by the Yang di-Pertuan Agong.

[57] The said Order as a *Gazette* is a form of subsidiary legislation (see s 18(1)(b) of the Interpretation Acts 1948 and 1967 ('Act 388')) and it shall be deemed to be validly made under the enabling power thereto (s 25 of Act 388). A *Gazette* is a prima facie evidence of the terms of written law, appointment or any other matter stated therein (s 61 of Act 388).

[58] The said Order was made by the Yang di-Pertuan Agong by virtue of s 2 of the Ministerial Functions Act 1969 (Act 2). Section 2 of Act 2 provides for 'Functions, styles and titles of Ministers'.

[59] Section 2(1) gives powers to the Yang di-Pertuan Agong to notify any changes with regard to the functions and responsibility in the Cabinet by an order in the *Gazette* and sub-s (2) allows His Majesty to make any consequential provisions deemed necessary for the purpose of giving effect to the said Order.

[60] Taking into consideration that the said Order, being a *Gazette*, is a prima facie evidence of the terms contained therein, it is clearly stated that in exercising his powers under s 2 of Act 2, The Yang di-Pertuan Agong notified the revocation of the appellant's appointment and the said Order was made under His Majesty's command. Such a command from His Majesty, in the absence of any contrary evidence, implies that it was made with explicit assent. This was further supported by the undisputed affidavit evidence of Haji Ja'apar and Tan Sri Halim Ali (see pp 66–73 of the AR) which explained that the Yang di-Pertuan Agong had given his assent to the said Order.

[61] The said Order would have been impossible without His Majesty's assent. His Majesty had given his assent to the terms in the said Order which in effect revoked the appellant's appointment. Once assent is given, it shows that His Majesty had accepted the advice of the Prime Minister and acted on such advice.

[62] The *Gazette* is therefore sufficient evidence to show that the requirement of the said article of the FC had been met. The appointment of the appellant as the Deputy Prime Minister and the Minister of Finance had therefore been validly revoked by the said Order.

[63] In view of the foregoing, we would say that the omission of the first respondent (if any) to follow the requirement under the said article of the FC is curable by the said Order. It follows therefore that the answer to question 2 must be in the positive.

CONCLUSION

[64] From our reading of arts 39, 40(1), 40(1A), 40(2) and 43(5) of the FC and arts 74 and 75(2) of the Indian Constitution, the interpretation of the relevant provisions of the FC by the constitutional law book writers and the cases we have cited, we must say with utmost respect that the High Court and the Court of Appeal were correct in their decisions that as a constitutional monarch the Yang di-Pertuan Agong is required to act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet. The convention that the Head of State must act on advice of the government on matters which are not within the purview of his discretion has been followed in Malaysia in the same manner as it is being practised in Britain.

[65] Finally we find ourselves in agreement with the learned High Court judge and the judges of the Court of Appeal that the appellant's case (OS) discloses no reasonable cause of action and is obviously unsustainable.

[66] In the result the appeal is dismissed with costs. Deposit to respondents to account of costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon